UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KEVIN L. FORAN,	***)***	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 98-230-P-H***
	)	
WILLIAM HENDERSON,	***)***	
United States Postmaster General,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Kevin L. Foran filed an eight-count amended complaint in this matter on January 4, 1999 alleging that William Henderson, United States Postmaster General ("Postal Service") discriminated against him in employment based on his disability (Counts I-III and VI), deprived him of property without due process of law (Count IV), breached an oral contract to reinstate him as a mail handler (Count V) and retaliated against him for protected activity (Count VII). Amended Complaint ("Complaint") (Docket No. 11) ¶¶ 33-90. The plaintiff also seeks a declaratory judgment that he need not exhaust administrative remedies pertaining to "the latest incidents of discrimination and retaliation" (Count VIII) as well as various forms of relief including punitive damages. *Id.* ¶¶ 91-94 & pp. 17-18.

The plaintiff now moves for partial summary judgment as to Counts I, II and V of his Complaint, and the defendant cross-moves for summary judgment as to all eight counts with the

request that, should any survive, the court rule that the plaintiff is not entitled to recover punitive damages. Motion for Partial Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 22); Defendant's Motion for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 26). In response to the defendant's motion, the plaintiff has withdrawn Count IV of his Complaint. Kevin Foran's Opposition to the Defendant's Motion for Summary Judgment, etc. ("Plaintiff's Opposition") (Docket No. 32) at 25 n.10. The scope of the defendant's motion accordingly narrows to the remaining seven counts and its request concerning punitive damages.

For the reasons that follow, I recommend that the defendant's motion be granted in part and denied in part and that of the plaintiff be denied.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). In cases such as this, involving cross-motions for summary judgment, the court must draw

all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

II. Analysis

A. Count I: Rehabilitation Act

The plaintiff alleges in Count I that the Postal Service violated the Rehabilitation Act by virtue of its termination on August 17, 1995 of his reappointment as a casual mail handler. Complaint ¶¶ 26, 40. To make out a case of termination based on disability discrimination a plaintiff must show that he or she (i) is disabled, (ii) can perform the essential functions of the job with or without reasonable accommodation and (iii) was discharged in whole or part because of his or her disability. *Leary v. Dalton*, 58 F.3d 748, 752-53 (1st Cir. 1995).[1]

"[A] plaintiff who lacks direct evidence of discrimination may proceed by engaging the three-stage order of proof articulated by the Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-05 . . . ." *Dichner v. Liberty Travel*, 141 F.3d 24, 29 (1st Cir. 1998). A plaintiff makes out a *prima facie* case of employment discrimination by showing, in essence, that he or she

[1]The plaintiff does not specify whether he is proceeding under Section 501 or 504 of the Rehabilitation Act. The First Circuit permits federal employees to sue under both sections. *Leary*, 58 F.3d at 752. Both sections incorporate the liability standards of the Americans with Disabilities Act; however, Section 504 alone continues to require a showing that a plaintiff was discriminated against solely because of his or her disability. *Id*. For purposes of this summary-judgment motion, I shall presume that the plaintiff need show only that he was discharged in part because of his disability.

is a member of a protected group who has been denied an employment opportunity for which he or she was otherwise qualified. *Id*. at 29-30. The successful establishment of such a *prima facie* case raises a presumption of discrimination that dissolves upon a showing by the employer that the action in question was undertaken for legitimate reasons. *Id.* The plaintiff retains the burden of proving that the proferred justification "is not only a sham, but a sham intended to cover up the proscribed type of discrimination." *Id.* at 30.

The plaintiff in this case suffers from a disability that limits his ability to read to approximately a first-grade level. Deposition of Claire S. Foran ("C. Foran Dep.") at 12.[2] He was hired by the Postal Service as a casual mail handler commencing September 7, 1994. Letter from Darlene LeBlanc to Kevin L. Foran dated August 30, 1994, attached as Exh. 32 to Defendant's Statement of Material Facts (Docket No. 27).[3] By letter dated August 4, 1995 the plaintiff was reappointed to an additional term as a casual mail handler; however, Joseph Troiano, operations manager, shortly thereafter rescinded the reappointment on the stated basis of performance evaluations received from three managers for whom the plaintiff had worked. Letter from Arthur J. Piteau to Kevin L. Foran dated August 4, 1995, attached as Exh. 11 to Joint Exhibits for Summary

[2]The plaintiff's performance on psychological and neuropsychological testing and his medical history are most compatible with functional deficits resulting from an acquired brain injury. Declaration of Richard G. Doiron ¶ 4. This declaration, the deposition of Claire S. Foran and, except as otherwise noted, all other declarations and depositions referred to in this recommended decision are to be found in the Redwell labeled "Declarations Statements and Depositions" submitted by the Postal Service in support of the Defendant's Motion.

[3]Mail handlers are responsible for the handling, routing and movement of mail into, out of and throughout the Portland plant. Declaration of Douglas Bailey ("Bailey Decl.") ¶ 3. In contrast to career mail handlers, casual mail handlers are temporary employees who are hired for a predetermined term, which during 1994 and 1995 was 359 days. Declaration of Marc Belhumeur ("Belhumeur Decl.") ¶ 6.

Judgment Pleadings ("Joint Exhibits"); Letter from Joseph Troiano to Kevin L. Foran dated August 17, 1995, attached as Exh. 36 to Joint Exhibits.

The plaintiff seeks summary judgment as to Count I on the basis that:

(i) the fact of his disability is undisputed;

(ii) purportedly positive evaluations by three supervisors (Troiano, Arthur Piteau and Dan Giguere) as well as the initial decision to reappoint the plaintiff demonstrate that he could perform the essential functions of a casual mail handler[4]; and

(iii) he was fired because of his disability, as evidenced *inter alia* by Troiano's alleged references to the plaintiff as "retarded" and a "fucking retard." Plaintiff's Motion at 3-9; *see also* C. Foran Dep. at 36; Affidavit of Marcel J. Desrosiers (Docket No. 25) ¶ 4.

The Postal Service cross-moves for summary judgment as to Count I because, in its view, the evidence establishes that the plaintiff was unable to perform the essential functions of the job of a casual mail handler and, in any event, the plaintiff has failed to demonstrate that he was terminated because of his disability. Defendant's Motion at 4-12. Essential functions, according to the Postal

[4]In an evaluation dated June 2, 1995 Troiano described the plaintiff's work performance as "minimally acceptable," noting that "I have the latitude of accommodating Kevin as a casual, but there is just no way that I can see of him being able to work for the Postal Service as a career employee . . . ." Memorandum from Joseph A. Troiano to Marc Belhumeur dated June 2, 1995, attached as Exh. 38 to Joint Exhibits. By memorandum dated July 6, 1995 Giguere observed that the plaintiff "is a good worker but required constant supervision and I do not believe that he would be able to handle being a regular employee because of the pressure for [sic] his peers and his inability to read. . . . Mr. Foran is able to work under the conditions that are set up for him on T-2 . . . ." Memorandum from D. Giguere to Whom It May Concern dated July 6, 1995, attached as Exh. 8 to Joint Exhibits. Piteau rated the plaintiff "excellent" in five of fourteen performance categories, "very good" in one, "good" in seven and "fair" in one. Evaluation of Kevin L. Foran by Arthur J. Piteau dated August 28, 1995, attached as Exh. 12 to Joint Exhibits. The evaluation provided space for listing any reasons why an "employee is unsatisfactory and should be separated," which Piteau marked as "N/A," meaning "not applicable." *Id; see also* Deposition of Arthur J. Piteau ("Piteau Dep.") at 43-44.

Service, include operation of a device known as the "sawtooth" and weighing of the mail using computerized scales — two functions that the plaintiff concedes he could not perform. *Id*. at 7; *see also* Declaration of Nancy Wiley-Gilpatrick ¶ 5 (essential functions of mail-handler job include operation of sawtooth and weighing mail using computerized scales); Bailey Decl. ¶ 20 (same); Deposition of Kevin L. Foran at 5, 9-10, 47-48 (no one showed plaintiff how to work on sawtooth and he made a few mistakes when he tried it; it was "kind of hard" for him to read tags on bags of mail; he was not shown how to work on the scales, which entails ability to read); Letter from Eileen Kalikow to Jim Moore and Bruce Hochman dated October 29, 1998 ("Kalikow Report"), attached as Exh. 99 to Joint Exhibits, at 10-11 (assessment by vocational rehabilitation specialist that plaintiff could not perform sawtooth or sack-central operation, jobs that could not feasibly be modified because of multiple tasks involved in reading and matching large numbers of locales and zip codes).[5]

---

[5]The plaintiff seeks exclusion of both the Bailey and Wiley-Gilpatrick declarations insofar as they purport to opine on the essential functions of the mail-handler job. Kevin Foran's Statement of Material Facts as to Which It Is Contended That There Exist Genuine Issues To Be Tried ("Plaintiff's SMF Opposition") (Docket No. 33) ¶¶ 22(1) & (3). The plaintiff characterizes Wiley-Gilpatrick's knowledge of essential functions as derived entirely from her deferential acceptance of Bailey's definitions (and hence lacking independent analysis); in addition, the plaintiff protests that he did not receive a signed copy of the Wiley-Gilpatrick declaration until May 11, 1999. *Id.* ¶ 22(1). The Postal Service rejoins that Wiley-Gilpatrick determined the essential functions of a mail handler by (i) reviewing written descriptions, (ii) touring the postal facility with Bailey and (iii) questioning Bailey and others doing the job. Defendant's Reply Statement of Material Facts ("Defendant's SMF Reply") (Docket No. 41) ¶ 22(1) (citing Deposition of Nancy Wiley-Gilpatrick, Vol. 1 of Joint Exhibits, at 21-23, 27-28). I am satisfied both that Wiley-Gilpatrick's review is sufficiently independent to be admissible and that the tardiness of her signature does not undermine the admissibility of her declaration. The plaintiff asserts that Bailey's testimony is inadmissible based on lack of appropriate foundation. Plaintiff's SMF Opposition ¶ 22(3). The Postal Service argues, and I agree, that Bailey was qualified to opine on the essential functions of the mail-handler position based on his "knowledge and understanding of the operations and the duties of the mail handlers." Defendant's SMF Reply ¶ 22(3) (quoting Deposition of Douglas A. Bailey, Vol. 1 of Joint Exhibits, at 78). The fact that Bailey never met the plaintiff is irrelevant; the fact that he did not review certain publications or undertake certain analyses may be relevant to the weight to be accorded his testimony (continued...)

I am satisfied that on this record neither party demonstrates entitlement to summary judgment as to Count I. First, although the plaintiff does not adduce his own expert testimony as to the essential functions of the job of a casual mail handler, he gathers sufficient evidence to cast that of the Postal Service in doubt. An employer's view of the essential functions of a job is but one of several factors to be weighed in assessing whether certain functions are in fact essential; other relevant information includes the amount of time spent on the job performing job-related functions, the consequences of not requiring the incumbent to perform one or more functions and the experience of past incumbents in the position. 29 C.F.R. § 1630.2(n)(3). The plaintiff introduces significant evidence attacking the Postal Service's characterization of the essential functions of a casual mail handler, *see generally* Plaintiff's SMF Opposition ¶ 22, including testimony of some longtime mail handlers at the Portland plant that they have rarely or never performed such functions as operation of the sawtooth or sack-central operations, *see, e.g.*, Declaration of George W. Seehagen, attached to Plaintiff's SMF Opposition, ¶¶ 3-11; Declaration of Raymond E. Killinger, attached to Plaintiff's SMF Opposition, ¶¶ 3-10.[6] *See also Hall v. United States Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988) (employee raised genuine factual dispute concerning whether heavy listing essential to clerk job).

Given the mist in which the essential-function question is shrouded, it follows that the court

---

[5](...continued)
but does not undermine its admissibility.

[6]The Postal Service objects that none of the individuals who provided the plaintiff with declarations has worked as a casual mail handler or supervisor. Defendant's SMF Reply ¶ 22(6). The testimony of incumbents in a job is relevant as to essential functions. *See, e.g.*, 29 C.F.R. § 1630.2(n)(3)(vii). In addition, the Postal Service has taken the position that the essential functions of the jobs of career and casual mail handling are the same. *See, e.g.*, Defendant's Reply Memorandum of Law, etc. (Docket No. 40) at 5.

is lacking an essential predicate upon which to determine the next question: whether the plaintiff was in fact capable of performing the essential functions of the casual mail-handler job. This too must be left to a trier of fact.[7]

The Postal Service next posits that at bottom the plaintiff still must lose on summary judgment because he fails to demonstrate that he was terminated as a result of his disability. Defendant's Motion at 11-12. The evidence, however, suffices to allow Count I to proceed. There is sharp dispute among experts, supervisors and co-workers as to whether the plaintiff's performance as a mail handler met at least minimal standards; however, it is clear that the plaintiff was terminated at least in part because he assertedly could not read well enough to perform the job, a problem intimately related to his disability. If a trier of fact were to conclude that the plaintiff could in fact read well enough to perform the essential functions of the job, the termination would seem to have been based more purely on the bare fact of the plaintiff's disability. The plaintiff, moreover, has adduced some evidence of discriminatory animus; Troiano allegedly referred to the plaintiff as a "fucking retard." Were a fact-finder to disbelieve the proferred reasons for the rescission and credit

[7]Although the plaintiff argues that the Troiano, Giguere and Piteau evaluations conclusively establish that he was capable of performing the job of a casual mail handler, there is counter-evidence from which a trier of fact could conclude that these three evaluators sheltered the plaintiff from performing certain functions of the job, some of which arguably were essential, and that their evaluations established merely that he could perform within the job as so limited. *See, e.g.*, Deposition of Joseph A. Troiano ("Troiano Dep.") at 42, 44 (Troiano agreed to hire plaintiff as favor to plaintiff's mother, Claire Foran, and knew at that time that plaintiff could not perform all functions of mail-handler job and would have to work under special conditions that Troiano could provide); Piteau Dep. at 30, 80 (Piteau limited evaluation to functions plaintiff could perform effectively; did not believe plaintiff was capable of performing all functions of career mail handler); Declaration of Damien A. Giguere ¶ 6 (Giguere told Troiano that plaintiff was unable to perform essential functions of mail handler and should not be reappointed as casual mail handler). The plaintiff's parents, Claire and Paul Foran, are longtime Postal Service employees; Troiano had been Claire Foran's first supervisor at the Postal Service. C. Foran Dep. at 5-7; Deposition of Paul Foran at 4-5, 26-27.

testimony regarding Troiano's disparaging remark, it could find that the Postal Service terminated the plaintiff at least in part because of his disability.[8]

B. Count II: Rehabilitation Act

The plaintiff contends in Count II that the Postal Service also violated the Rehabilitation Act by failing to accommodate his learning disability, including failing to engage in any interactive dialogue with him concerning possible accommodations. Complaint ¶¶ 47-50. The plaintiff seeks summary judgment as to this count on the ground that the Postal Service, if it felt the plaintiff was not "otherwise qualified" for the job, had an obligation to explore accommodations before firing him, which it did not do. Plaintiff's Motion at 9. The Postal Service cross-moves for summary judgment on the basis that Count II does not state an independent cause of action but merely is redundant of Count I. Defendant's Motion at 12-13.

The Postal Service relies upon an unpublished opinion of this court, *Desrosiers v. Runyon*, Civil No. 97-391-P-C (D. Me. April 29, 1998), for the proposition that an allegation of failure to engage in an interactive process does not state an independent cause of action. *Id*. The plaintiff contends, and I agree, that the instant case is distinguishable. *See* Plaintiff's Opposition at 17-18.

[8]The plaintiff also contends that a remark by personnel specialist Marc Belhumeur establishes animus against the disabled. Plaintiff's Motion at 8-9. Belhumeur, who encouraged Troiano to rescind the plaintiff's reappointment on purported grounds of poor performance, wrote that in the wake of the hiring of another disabled employee whose performance was poor, "I thought one Voc. Rehab. hire was enough for now. . . . I assumed I'd be lucky to get one handicap hired." Memorandum for the Record by Marc R. Belhumeur dated September 5, 1995, attached as Plaintiff's Exh. 200 to Joint Exhibits, at 5383-84. The Postal Service argues, and I agree, that this statement cannot reasonably be read to establish animus against the disabled. *See, e.g.*, Defendant's SMF Reply ¶ 18. Belhumeur was responsible for the process of hiring mail handlers through the non-competitive Severely Handicapped Program. Rule 30(b)(6) Deposition of United States Postal Service by Marc R. Belhumeur ("Belhumeur Dep.") at 40-44. While the choice of the word "handicap" to describe disabled applicants was not felicitous, the statement viewed in context establishes Belhumeur's concern that the program was at risk of developing a poor reputation.

In *Desrosiers*, the plaintiff had alleged in Count I that the Postal Service failed to accommodate his disability, in Count II that the Postal Service failed to engage in an interactive dialogue regarding possible accommodation, and in Count III that the Postal Service constructively discharged him in violation of the Rehabilitation Act. *Desrosiers*, slip op. at 2-3, 6-9. Because Count II merely alleged a possible means by which the duty of reasonable accommodation had been violated, it duplicated the allegations of Count I. *Id.* at 7.

In the instant case Counts I and II are contradistinct. The gravamen of Count I (despite passing reference to failure to accommodate) is that the Postal Service discriminated against the plaintiff by terminating his reappointment as a casual mail handler. *See* Complaint ¶¶ 33-43. It is thus analogous to Count III in the *Desrosiers* case, alleging constructive discharge. Count II, by contrast, fairly can be read (despite its emphasis on the alleged necessity to engage in interactive dialogue) to allege failure to provide reasonable accommodation. *See* Complaint ¶ 50. It is thus analogous to Count I of the *Desrosiers* case, alleging failure to provide reasonable accommodation. Moreover, failure to provide reasonable accommodation to a qualified individual with a disability is in itself an act of disability discrimination. *See, e.g., Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 515 (1st Cir. 1996) ("There may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA.").

Turning next to the merits, the plaintiff contends that he is entitled to summary judgment inasmuch as the Postal Service never considered possible accommodations for him despite its knowledge that he suffered from a disability. Plaintiff's Motion at 9-15; *see also* Belhumeur Dep. at 66-67 (Belhumeur did not explore possibility of accommodations for plaintiff); Rule 30(b)(6)

Deposition of United States Postal Service by Robert S. Hylen, Vol. 1 of Joint Exhibits, at 33 (no one in plaintiff's case investigated whether there could be reasonable accommodation of his disabilities).

The plaintiff asserts that even in cases in which an employer feels that a disabled person cannot perform the essential functions of the job, the employer must consider whether reasonable accommodation can be made before firing such an employee. Plaintiff's Motion at 10; *see also Hutchinson v. United Parcel Serv., Inc.*, 883 F. Supp. 379, 391 (N.D. Iowa 1995). The *Hutchinson* court does not, however, suggest that an employer may be held liable to an employee who, at the end of the day, cannot demonstrate that he or she could have performed the essential functions of the job with or without reasonable accommodation. To the contrary, the court makes clear that "[t]o qualify for relief under the ADA" a plaintiff must establish *inter alia* "that he or she is qualified, that is, with or without reasonable accommodation (which the plaintiff must describe), he or she is able to perform the essential functions of the job." *Id*. at 393. *See also Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14, 19 (1st Cir. 1998) (assertion that employer failed to engage in meaningful interaction with plaintiff regarding reasonable accommodation "of no moment" because no reasonable trier of fact could have found plaintiff capable of performing essential functions of job). Because, in this case, there are material disputes whether the plaintiff was capable of performing the essential functions of the job of casual mail handler, he cannot prevail on summary judgment with respect to this aspect of his Rehabilitation Act claims.

C. Count III: Rehabilitation Act

In Count III the plaintiff alleges violation of the Rehabilitation Act based on the Postal Service's failure to hire him as a career mail handler. Complaint ¶¶ 54-61. The Postal Service

moves for summary judgment as to this count on three alternative bases, the first of which I find dispositive: that the plaintiff never properly came under consideration for a career position in 1995. Defendant's Motion at 13-16.

Basic to a failure-to-hire claim is a showing that the plaintiff applied for the job in question. *See, e.g., Cook v. State of R.I., Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 22 (1st Cir. 1993) (failure-to-hire case under Section 794 of Rehabilitation Act requires showing that plaintiff applied for post in federally funded program or activity). The plaintiff fails to make this fundamental showing based upon the following:

In spring 1995 Paul Foran told Belhumeur that his son had been hired as a casual mail handler and was doing well in that position. Belhumeur Decl. ¶ 9. Paul Foran inquired whether the Postal Service would be interested in hiring the plaintiff as a career employee, and Belhumeur agreed to look into it. *Id.* ¶¶ 9-10.

A career mail handler typically is hired through a competitive process. *Id.* ¶ 3. As part of that process, the prospective mail handler must successfully complete a qualifying written examination. *Id*. The score achieved on this examination determines the applicant's rank on the Postal Service's career hiring register. *Id*. Selection of new hires is made from the top of the hiring register in descending order. *Id*. On occasion, however, the Postal Service hires mail handlers who have disabilities through a non-competitive process known as the Severely Handicapped Program. *Id*. ¶ 4. Use of the Severely Handicapped Program, which is discretionary, proceeds in accordance with postal regulations contained in Personnel Operations Handbook EL-311. *Id.* ¶¶ 4-5. These regulations provide in relevant part:

261.542 Potential Applicants. [P]ostal management contacts the appropriate State

DVR [Department of Vocational Rehabilitation] or VA [Veterans Affairs] counselors to discuss potential placement opportunities when a hiring need exists. State DVR or VA counselors make the initial identification of potential applicants for referral to the Postal Service. They identify those individuals who are eligible and qualified for employment consideration before initiating the applicant certification stage of the hiring process.

261.543 Determining Job Requirements. A site visit and a prehire orientation session including a tour of a postal facility will be jointly arranged by the post office and State DVR or VA. The DVR and/or VA counselors must receive an onsite demonstration of the functional and physical requirements of each job. In cases where the essential functions of a position have not been clearly identified through official postal sources, the installation management must identify them. Subject matter experts such as incumbents, former incumbents, supervisors, and other individuals knowledgeable about the performance and requirements of the job should be consulted. A list of the major tasks, with some indication of how critical and important they are (which may be assessed by considering the consequences of error or omission) and how frequently they are performed, must be provided. . . . This information will help the rehabilitation counselors to further screen potential applicants and identify those individuals who are likely to be successful in available postal positions.

261.544 Hiring Process. [T]he following steps must be taken when a hiring need exists:

a. postal management requests the State DVR or VA to certify 3 names for consideration and 1 additional name for each additional vacancy. . . .

b. The applicants referred are considered and a tentative selection(s) made in accordance with suitability guidelines . . . . A list of those applicants not selected for positions is returned to the State DVR or VA, as appropriate.

***

d. Following the [selected] applicant's successful completion of the medical examination, the appointing officer (or designee) schedules a meeting with the applicant, rehabilitation counselor, handicap program coordinator, and immediate supervisor or designated operations manager to discuss the requirements (e.g., checklist, reasonable accommodation issues, and essential job functions) outlined in Handbook EL-307, *Guidelines on Reasonable Accommodation*. . . .

Personnel Operations Handbook EL-311, April 1990 ("EL-311"), attached as Defendant's Exh. 200 to Joint Exhibits, at 313.[9]

Belhumeur was aware that the plaintiff previously had been certified by the state vocational-rehabilitation agency ("VR") as capable of performing the job of career mail handler and that his name had been submitted for consideration as a career mail handler in 1993.[10] Belhumeur Decl. ¶ 10. Belhumeur thus assumed that the plaintiff's name would be among those submitted by VR in response to a new request. *Id*. In May 1995 Belhumeur initiated an inquiry to VR in Portland and requested names of certified applicants to fill a career mail-handler position at the Portland plant. *Id*. ¶ 11. VR submitted a list of candidates in June 1995; the plaintiff was not among them. Belhumeur Dep. at 45. Belhumeur endeavored to determine why this was so and discovered both that the plaintiff was served by the Biddeford VR office and that the Biddeford office had closed the plaintiff's file after he obtained casual employment with the Postal Service. Belhumeur Decl. ¶ 15. Had Belhumeur wished to consider the plaintiff, he could have requested that VR refer the plaintiff's name to the Postal Service. Declaration of Anne Dobson, attached to Plaintiff's SMF Opposition, ¶ 5. If the plaintiff's counselor felt that she could certify him for the employment in question, VR would have referred the plaintiff's name. *Id.* ¶ 6.

The plaintiff never properly was certified to the Postal Service in 1995 as a candidate for

---

[9]Mail handlers hired through the Severely Handicapped Program are exempt only from the requirement that they complete the Postal Service's written examination; they still must be capable of performing all of the essential functions of the mail-handler job with or without reasonable accommodation. Belhumeur Decl. ¶ 4; C. Foran Dep. at 46.

[10]The Postal Service interviewed the plaintiff but did not select him for the position. Belhumeur Decl. ¶ 8.

career mail handler through the Severely Handicapped Program. Paul Foran did request that his son be considered for a career position; however, because the plaintiff did not apply through the competitive process (entailing completion of a qualifying examination), he was considered through the vehicle of the Severely Handicapped Program. The regulations applicable to that program make clear that the VR must "make the initial identification of potential applicants for referral to the Postal Service." EL-311, § 261.542, at 313. Postal management must follow a certain sequence of steps "when a hiring need exists," the first of which is that it must ask the state agency to certify three names for consideration. EL-311, § 261.544, at 313. Belhumeur did so, assuming that the plaintiff's name would be among them. It was not. Belhumeur could not have fallen back on the 1993 certification of the plaintiff provided to the Postal Service; the regulations contemplate that three names are to be requested "when a hiring need exists" — meaning, in my view, each time a new hiring need exists. Nor did Belhumeur have any duty to ask that the agency specifically send the plaintiff's name. Indeed, such a request arguably would have run afoul of the regulations, which vest the agency with responsibility for selection of qualified candidates.[11]

D. Count V: Breach of Oral Agreement

The plaintiff in Count V alleges breach of an October 13, 1998 oral agreement whereby he was to be reinstated as a mail handler if a designated vocational-rehabilitation specialist determined

[11]The plaintiff misquotes the EL-311 in arguing that the regulations contemplate a discussion between postal management and the rehabilitation agency of specific applicants. The plaintiff states that section 261.542 of the EL-311 requires management to call the agency "to discuss potential applicants for referral to the Postal Service." Plaintiff's Opposition at 19. The regulation in question directs postal management to contact the agency "to discuss potential placement opportunities when a hiring need exists." EL-311, § 261.542, at 313.

that he could perform the essential functions of the job with or without reasonable accommodation.[12] Complaint ¶¶ 67-73. Both sides move for summary judgment as to this count; however, disputed issues of material fact preclude a grant in favor of either.

The Postal Service argues that, even assuming *arguendo* the parties reached agreement, it failed for lack of consideration. Defendant's Motion at 20. However, plaintiff's counsel Bruce Hochman testified that the plaintiff agreed to be "bound" by the report produced by the vocational-rehabilitation specialist (Eileen Kalikow), and that if Kalikow determined that the plaintiff could not do the job, "I'm free to sue, but, you know, the issue of reinstatement is now a different situation." Deposition of Bruce B. Hochman ("Hochman Dep.") at 108-09. Such a potential detriment to the plaintiff and corresponding benefit to the Postal Service suffices to support the alleged agreement; no specific quantum of consideration is required. *See, e.g., Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978), *overruled on other grounds by Bahre v. Pearl*, 595 A.2d 1027 (Me. 1991) ("consideration may consist in some benefit to the promisor or some loss or detriment to the promisee").

The Postal Service next contends that, again assuming *arguendo* the parties reached agreement, the plaintiff failed to satisfy a precondition — namely, that Kalikow find the plaintiff capable of performing the essential functions of the mail-handler job. Defendant's Motion at 19-20. In her report Kalikow concluded that the plaintiff could not perform certain duties (including the sawtooth and sack-central operations) and that other tasks would be performed with diminished

[12]In June 1998, shortly after the Complaint in this case was served upon the Postal Service, James M. Moore, the assistant United States attorney assigned to the matter, and A. Elaine Parsons, counsel for the Postal Service, began to explore with plaintiff's counsel whether the parties could achieve early settlement of the case. Rule 30(b)(6) Deposition of United States Postal Service by A. Elaine Parsons dated March 22, 1999 ("First Parsons Dep.") at 11-12, 18-19.

output. Kalikow Report at 10-12. She felt that an eight-hour job could be structured omitting tasks that the plaintiff could not perform, *id*. at 11-12; however, she admitted at deposition that she did not evaluate the plaintiff's ability to perform essential functions because, she said, she was unable to obtain a clear answer from the Postal Service as to what those essential functions were, Deposition of Eileen Kalikow at 227-28. Because those essential functions remain murky on this record, the Postal Service is not entitled to summary judgment on this ground.

Both sides, finally, strenuously contest whether a binding oral agreement was in fact reached on October 13, 1998. Plaintiff's counsel Hochman flatly states that the parties then agreed that if Kalikow found the plaintiff capable of performing the essential functions of the mail-handler job, the plaintiff would be reinstated. Hochman Dep. at 108-09. The plaintiff also claims that Parsons' testimony confirms that her understanding was the same as that of Hochman. Plaintiff's Motion at 16-17. However, Parsons did not testify that the Postal Service agreed to reinstate the plaintiff — period — but rather that it agreed to offer reinstatement as part of a global package if informed by Kalikow that the plaintiff could perform the essential functions of the job. First Parsons Dep. at 34-35.[13]

The distinction is subtle but important. Parsons testified, in essence, that the parties agreed to enter into an agreement. "A mere declaration of intention to enter into an agreement at some time in the future, even if the terms are stated with definite specificity, is not an offer which can be accepted to form a binding contract." *Zamore*, 395 A.2d at 440, *overruled on other grounds by*

[13]In addition, Moore avers that at no time during settlement discussions between Hochman and himself did the Postal Service and the plaintiff reach agreement, nor did he have authority to reach an agreement, whereby the Postal Service would reinstate the plaintiff. Declaration of James M. Moore (Docket No. 43) ¶ 4.

Bahre, 595 A.2d 1027. A trier of fact must sort out whether the parties agreed to reinstate the plaintiff, or whether the Postal Service merely agreed to make a global offer that would include terms of reinstatement, upon receipt of a favorable report by Kalikow.

E. Counts VI and VII: Rehabilitation Act

The plaintiff claims in Counts VI and VII that the Postal Service's breach of the alleged October 13, 1998 agreement separately discriminated against him based on his disability and also constituted impermissible retaliation in violation of the Rehabilitation Act. Complaint ¶¶ 74-90. The Postal Service seeks summary judgment as to both counts on two grounds: (i) lack of a binding oral agreement and (ii) failure to exhaust remedies. Defendant's Motion at 21-22. Inasmuch as the Postal Service now admits that since the filing of its motion for summary judgment the plaintiff received a final agency decision on the issues raised in Counts V through VIII of his Complaint, the latter point is moot. *See* Defendant's SMF Reply ¶ 127. Nor is the Postal Service entitled to summary judgment on the former ground. As I have previously determined, disputed issues of material fact preclude determination on summary judgment whether a binding oral agreement was formed.

F. Count VIII: Declaratory Judgment

The plaintiff in Count VIII seeks a declaratory judgment that he need not exhaust administrative remedies with respect to "the latest incidents of discrimination and retaliation including the refusal to reinstate him to a job as a mail handler." Complaint ¶ 92.[14] Because the Postal Service now concedes that the plaintiff received a final agency decision as to Counts V

[14]The plaintiff clarifies that Count VIII alludes to the alleged 1998 breach of agreement. Plaintiff's Motion at 2.

through VII, the request for declaratory judgment is moot. The Postal Service accordingly is entitled to summary judgment with respect to this count.

G. Punitive Damages

The Postal Service finally seeks a ruling that punitive damages are unavailable in this case on two alternative grounds: (i) that the Postal Service is immune from such damages as a matter of law and (ii) that on this record no reasonable trier of fact could find the Postal Service liable for such damages. Defendant's Motion at 22-24.

I need not reach the question whether punitive damages are available as a matter of law. Even assuming *arguendo* that they are, I cannot see how a reasonable trier of fact could find the Postal Service so liable on this record. A jury in a disability-discrimination case is permitted to assess punitive damages "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Dichner*, 141 F.3d at 33 (citation and internal quotation marks omitted).

In the massive record presented, I discern only one statement that arguably evidences evil motive — that Troiano allegedly termed the plaintiff a "fucking retard." Troiano, in addition, allegedly wore a surprised look on his face upon meeting the plaintiff, referring to him (behind his back) later that day as "retarded." *See* C. Foran Dep. at 35-36. Troiano, however, hired the plaintiff as a casual mail handler as a favor to the plaintiff's mother. He declined during the plaintiff's tenure to authorize a lower-level manager to fire the plaintiff on the basis of poor performance, although he testified that upon hearing such negative reports regarding a casual employee he normally would have authorized immediate termination. Troiano Dep. at 78, 80, 94. Taken as a whole, the evidence simply does not establish evil motive in Troiano's treatment of the plaintiff. Nor does it establish

reckless or callous indifference to the plaintiff's federally protected rights. Troiano testified that he "cover[ed]" for the plaintiff as a favor to the plaintiff's mother. *Id*. at 69. He may have been mistaken in assuming that the plaintiff could not perform the job and negligent in not verifying whether this was so. But this is not tantamount to reckless or callous indifference toward the plaintiff's federal rights.

III. Conclusion

For the foregoing reasons, I recommend that the motion of the Postal Service for summary judgment be **GRANTED** as to Counts III and VIII of the Complaint and the availability of punitive damages, and in all other respects **DENIED**, and that the plaintiff's motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of July, 1999.

_____

David M. Cohen
United States Magistrate Judge